

**LEGAL BULLETIN 1.5**  
**Federal Tort Claims Act (FTCA)**

**Disclaimer:** While we have attempted to provide information that is current and useful, the law changes frequently. We cannot guarantee that all information is current. If you have access to a prison library, we suggest you confirm that the cases and statutes are still good law.

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**I. INTRODUCTION**

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, is a statute that was passed by the United States Congress in 1946. Although the United States is generally immune from suit under a doctrine called “sovereign immunity,” the FTCA allows certain claims, based on tort law, to be brought against the United States for the negligent or wrongful acts of its employees. The FTCA confers jurisdiction on the federal district courts to adjudicate claims for damages “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b).

**Sovereign Immunity**

The ability to sue the government is rare – usually, the government is protected from being sued by a legal doctrine called “sovereign immunity.” Sovereign immunity means that no suit can be brought against the sovereign (the government) without its consent. This concept was inherited from England and has existed in the United States since its beginning. The FTCA waives the federal government’s sovereign immunity in certain circumstances and enables people to sue the federal government for wrongful conduct by a federal government employee which results in injury.

**II. WHAT IS A TORT?**

In general, a tort is a wrong or injury that is committed against someone for which the law provides a remedy. Torts are “civil,” not criminal, in nature. The purpose of a civil lawsuit is to compensate someone for wrongful injuries or damage they received. This is different from a criminal case, where the main purpose is to punish the wrongdoer.

While there are many kinds of torts, they can generally be classified into three groups: intentional, negligent, and strict liability. The focus of the Federal Tort Claims Act is on negligent and intentional torts. Each state has different laws (both statutes and court cases) that set forth which tort claims may be brought. Because the law of the state where the incident occurred will apply to your FTCA claim, you need to look at the law of that state to find out which tort claims are recognized and exactly what is required in order to prove your claim.

**Intentional torts** – an intentional tort is broadly defined as a deliberate act that causes harm to another. The person must intend to do the act that causes the harm. Examples of intentional torts are: assault, battery, false imprisonment, false arrest, and malicious prosecution.

**Negligence** – Someone has been negligent if they have not used the amount of care that a reasonable person would have used in the same situation. There are four essential elements of a negligence claim: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached (or violated) this duty; (3) the breach of duty caused harm to the plaintiff; and, (4) the plaintiff suffered injury as a result.

### III. SCOPE OF THE FTCA

#### A. When Can You Bring an FTCA Claim?

You can bring an FTCA claim if:

- (1) It is against the United States;
- (2) It is for money damages;
- (3) You have had personal injury or death;
- (4) The personal injury or death was caused by a negligent or wrongful act or omission;
- (5) The negligent or wrongful act or omission was committed by a federal employee;
- (6) The federal employee was acting within the scope of his or her employment;
- (7) Certain exclusions stated in the FTCA do not apply; and,
- (8) The United States (if it was a private person) would be held responsible under the law of the place where the act occurred.

#### B. When Can't You Bring an FTCA Claim?

There are limits to bringing an FTCA claim. You cannot bring an FTCA claim in the following situations: certain named torts; if the actor was exercising “due care” when carrying out duties under a statute or regulation; discretionary acts, constitutional violations; certain statutory violations; work-related injuries; strict liability claims; property claims (if you are incarcerated); and a few other exceptions.

##### 1. Certain named torts are excluded by the FTCA.

Under 28 U.S.C. § 2680(h), you generally cannot bring an FTCA claim for the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

However, there is a very important exception (called “the law enforcement proviso”) when certain acts are committed by an investigative or law enforcement officer.

The law enforcement proviso states:

“ . . . with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of **assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution**. For the purposes of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”

28 U.S.C. § 2680(h).

Officers and employees of the Bureau of Prisons are considered investigative or law enforcement officers based on the duties assigned to them by statute. *See* 18 U.S.C. § 3050 (authorizing BOP officers to make arrests without warrants in certain circumstances).

In *Millbrook v. United States*, 569 U.S. 50 (2013), the Supreme Court held that the law enforcement proviso applied to acts and omissions of BOP employees that are done within the scope of their employment. *Millbrook*, 569 U.S. at 57. Therefore, the FTCA waived the United States' immunity from claims based on such acts. *Id.* The *Millbrook* case overturned *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986) which had held that the officer needed to be engaged in the specific law enforcement activities identified in the proviso (executing a search, making an arrest, or seizing evidence) in order for the proviso to apply. Thanks to *Millbrook*, cases that imposed this restrictive view of the law enforcement proviso based on *Pooler* are no longer good law.

Keep in mind that the law enforcement proviso only applies to the six torts specifically listed within the proviso - it does not change the fact that you can NEVER bring an FTCA claim for libel, slander, misrepresentation, deceit, or interference with contract rights.

## 2. The “Due Care” exception

Section 2680(a) contains two more exceptions which prohibit certain claims from being asserted under the FTCA. The first is called the “due care exception.” This exception applies when a federal employee was carrying out his or her duties under a statute or regulation and was exercising “due care” while doing so. “Due care” is a term in negligence law that means “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.” Black's Law Dictionary, Abridged 7<sup>th</sup> Edition at 167.

Courts employ a two-part test to determine whether the “due care” exception applies:

- 1) whether the statute or regulation specifically mandates the course of action that the employee must follow; and,
  - 2) whether the employee deviated from the requirements of the statute or regulation or otherwise failed to act with due care.
- Welch v. United States*, 409 F.3d 646, 652 (4<sup>th</sup> Cir. 2005).

## 3. Discretionary Acts – the “Discretionary Function Exception”

The FTCA's discretionary function exception (“DFE”) provides that the United States does not consent to suit for claims which are “. . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a).

The Supreme Court has held that the discretionary function exception applies only to those governmental actions and decisions that involve an element of judgment or choice and that are based on public policy considerations. *See Berkowitz v. United States*, 486 U.S. 531 (1988). When a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow, the discretionary function exception will not apply because the employee has no rightful option but to adhere to the directive. *See id.* at 536.

Under the discretionary function exception, the United States cannot be held responsible for a federal

employee's conduct if the employee was performing (or not performing) a discretionary function or duty. 28 U.S.C. § 2680(a). If the statute, regulation, or policy governing the employee's conduct gave them some leeway to decide how to do the job, then it does not matter whether the employee was acting with due care or not.

### **How does a court determine if the Discretionary Function Exception applies?**

Determining when an act is discretionary (when an act is a matter of choice for an acting employee) can sometimes be a difficult task, both for you as the Plaintiff in a lawsuit, and for the court. The first step is to identify the specific conduct that is at issue. *S.R.P. v. United States*, 676 F.3d 329, 332-33 (3d Cir. 2012) (citation omitted). Then, the court engages in a two-part test set forth by the Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991). *Id.* at 333.

- (1) First, the court must determine whether the conduct involved “an element of judgment or choice.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991). If there is a federal statute, regulation, or policy specifically setting forth a course of action for an employee to follow and the employee “has no rightful option but to adhere to the directive,” then the conduct is not discretionary and the discretionary function exception does not apply. *See Berkovitz*, 486 U.S. at 536.
- (2) If the conduct involves an element of judgment or choice, the court moves on to the second part of the test and determines “whether that judgment is of the kind that the discretionary function exception was designed to shield.” *See Berkovitz* at 536. “The [discretionary function] exception protects only governmental actions and decisions based on considerations of public policy.” *Gaubert*, 499 U.S. at 322-23.

### **Which side has the burden to prove that the DFE applies or does not apply?**

Circuit courts are divided on the question whether it is the Government's burden to prove that the DFE applies or the plaintiff's burden to prove that it does not. *Compare Terbush v. United States*, 517 F.3d 1125, 1128 (9<sup>th</sup> Cir. 2008) (government has the burden to prove that the discretionary function exception applies); *S.R.P. v. United States*, 676 F.3d 329, 333 (3d Cir. 2012) (same); *with Aragon v. United States*, 146 F.3d 819, 823 (10<sup>th</sup> Cir. 1998) (plaintiff must prove that the DFE does not apply); *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 857 (4<sup>th</sup> Cir. 2016) (same). Some courts have declined to decide this issue. *See, e.g., Sharp v. United States*, 401 F.3d 440, 443 n.1 (6<sup>th</sup> Cir. 2005).

Regardless of who has the burden to prove or disprove the DFE in the federal circuit you are in, you will need to think carefully about how you can show that the discretionary function exception does not shield the Government from liability in your case. Even if you do not have the burden to prove that the DFE does not apply, you will need to respond to the Government's arguments that it does apply.

### **How have courts ruled on the DFE question with regard to various types of conduct?**

As the application of the discretionary function exception can be difficult to sort out, and the analysis is fact-intensive, court decisions are sometimes conflicting (and confusing). Below are some examples of cases (both prison-related and not) involving the DFE.

#### Prisoner violence stemming from violation of a mandatory duty:

*Parrott v. United States*, 536 F.3d 629, 638 (7<sup>th</sup> Cir. 2008) (discretionary function exception not

applicable where BOP failed to adhere to mandatory prisoner separation order as required by 28 C.F.R. § 524.72 (f)).

*Gray v. United States*, 486 F.App'x. 976, 978, (3d Cir. 2012) (not precedential) (discretionary function exception not applicable in case where plaintiff's cellmate slashed him with a razor that was not collected by staff after shower time, in violation of directive in the Inmate Handbook stating that razors must be collected after shower time).

*Rivera v. United States*, Civ. No. 12-1339, 2013 WL 5492483 at \*5-6 (M.D. Pa. Oct. 2, 2013) (DFE not applicable to negligence claim based on staff's failure to search inmate before placing him in rec cage, because post orders required that both a pat search and a hand-held metal detector be used to screen inmates).

#### Prisoner violence stemming from negligent classification, housing, and cellmate assignments:

Many courts have held, generally, that decisions relating to transfers, classification, housing placement, and cellmate assignments are discretionary and based on "policy considerations" and therefore, any claims arising from cellmate violence resulting from those decisions are barred by the discretionary function exception. *See Santana-Rosa v. United States*, 335 F.3d 39, 44 (1<sup>st</sup> Cir. 2003) (decisions related to "classification of prisoners, assignment to particular institutions or units, and allocation of guards and other correctional staff must be viewed as falling within the discretionary function exception of the FTCA, if penal institutions are to have flexibility to operate.").

*But see Keller v. United States*, 771 F.3d 1021, 1024-1026 (7<sup>th</sup> Cir. 2014) (rejecting Government's argument that the DFE automatically applies to all prisoner violence cases and reversing the District Court's dismissal of plaintiff's negligence claims because there was insufficient evidence in the record to support the Government's arguments that the DFE applied to the conduct of the intake psychologist and the compound guards.).

#### Violence stemming from negligence in making prisoner work assignments:

Claims stemming from negligence in assigning jobs to prisoners are often barred by the DFE. *See, e.g., Santana-Rosa*, 335 F.3d at 43-44 (negligent work assignment claim barred by discretionary function exception because BOP had "room for choice" in deciding to assign plaintiff's attacker to a kitchen orderly position and such decisions were grounded in "policy-based analysis."); *Middleton v. United States*, 658 F.App'x 167, 170 (3d Cir. 2016) (not precedential) (same).

#### Threat investigation:

Courts have held that prison officials' decisions on how to investigate and respond to inmates' threats of violence are discretionary and based on policy considerations and therefore are protected by the DFE. *See Calderon v. United States*, 123 F.3d 947, 949-951 (7<sup>th</sup> Cir. 1997) (DFE applied to claim arising from cellmate's attack on plaintiff after plaintiff informed prison officials of threat); *Alfrey v. United States*, 276 F.3d 557, 564-565 (9<sup>th</sup> Cir. 2002) (BOP officers had discretion on how to respond to threat reported by decedent). *But see Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 398 (6<sup>th</sup> Cir. 2004) (opining that "... decisions by prison officials to ignore specific and immediate threats against inmates are less likely to be the type of decision that can be said to be grounded in the underlying policy of the BOP, which requires prison officials to provide for the safekeeping and protection of inmates. *See* 18 U.S.C. § 4042(a).")

### Negligence claims involving employee supervision, monitoring, and assignment:

Supervision and monitoring of BOP staff have frequently been found to be discretionary conduct, triggering the application of the DFE. *See Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (“allegedly negligent and reckless employment, supervision and training” of government employees “fall squarely within the discretionary function exception.”). *But see Riascos-Hurtado v. United States*, Civ. No. 09-003 (RJD)(VMS), 2015 WL 3603965, at \*6-7 (E.D. N.Y. June 5, 2015) (careless and inattentive failure of BOP employees to report sexual abuse of plaintiff by BOP counselor was not plausibly based on public policy considerations and negligent supervision claim was therefore not barred by DFE).

In *Garza v. United States*, 413 F. Supp. 23 (W.D. Okla. 1975), the court held that decisions concerning assignment of prison staff are discretionary.

### Negligent application of restraints:

BOP staff's decisions on how to apply restraints have been found by some courts to be discretionary. *See Smith v. United States*, No. 7: 20-CV-94-DCR, 2021 WL 206355, at \*5 (E.D. Ky. Jan. 20, 2021) (holding that decisions by BOP officials regarding restraint of an inmate “relate to their exercise of discretion regarding prisoner safety. Accordingly, these decisions fall within the discretionary function exception.”), *appeal dismissed*, No. 21-5187, 2021 WL 2222846 (6<sup>th</sup> Cir. Apr. 2, 2021); *Hatten v. Bledsoe*, No. 1: 13-CV-00209, 2018 WL 6985205, at \*11-12 (M.D. Pa. Dec. 21, 2018) (inmate's claims that officers applied restraints in a “negligent, careless, and harmful manner” and of the alleged “lack of supervision concerning the imposition of restraints” fell within the discretionary function exception), *report and recommendation adopted*, No. 1:13-CV-0209, 2019 WL 144962 (M.D. Pa. Jan. 9, 2019), *aff'd*, 782 F.Appx. 91 (3d Cir. 2019).

### Negligent pat-downs and body searches:

Courts have reached opposite conclusions on the discretionary function exception question in cases involving negligent pat-down searches of inmates. *Compare Rich v. United States*, 811 F.3d 140, 147 (4<sup>th</sup> Cir. 2015) (Although prison officials had discretion in implementing a pat-down policy, the way that the pat-downs were conducted was not discretionary and could have been completed negligently) *with Hooker v. United States*, No. 11-cv-2840, 2013 WL 3491089, at \*7 (S.D.N.Y. July 12, 2013) (DFE applied to negligence claims stemming from pat-down and wand searches because the manner and speed of search were discretionary).

### **The specific facts giving rise to the claim matter in the DFE analysis.**

The discretionary function exception analysis required by *Gaubert* is highly fact-specific. *See Prescott v. United States*, 973 F.2d 696, 700 (9<sup>th</sup> Cir. 1992) (discretionary function exception analysis requires “a particularized and fact-specific inquiry to determine whether the acts or omissions in question flowed from a choice based on social, economic and political policy”); *Mitchell v. United States*, 225 F.3d 361, 365 (3d Cir. 2000). In cases where there was not enough evidence in the record to support the application of the DFE, courts have denied the Government's motion to dismiss and, in some instances, permitted the parties to engage in limited discovery to develop the necessary facts. *See, e.g., Sledge v. United States*, 723 F. Supp. 2d 87 (D.D.C. 2010); *Palay v. United States*, 349 F.3d 418, 431 (7<sup>th</sup> Cir. 2003); *Martin v. United States*, 2022 WL 2274706, at \*10-11, Civ. No. 21-02107-NYW (D. Colo. 2022); *McIntosh v. United States*, 845 F.App'x.88, 92 (3d Cir. Feb 4, 2021) (not precedential).

## How do I find out if a mandatory duty exists that pertains to my claim?

To determine if an employee's actions in your case were discretionary or non-discretionary, as required by the first prong of the *Gaubert* test, federal statutes, federal regulations (the “Code of Federal Regulations,” or “C.F.R.”), and Bureau of Prisons program statements can be a good place to begin your research.<sup>1</sup> Some of these sources are publicly available and should be available for you to review in your institution's law library. Other types of documents may also contain relevant information, such as inmate handbooks, institution supplements, post orders, employee handbooks, and executive memoranda pertaining to the issues in your case. Some of these are not publicly available, so you will likely have a more difficult time obtaining them. If you believe that a document exists which may contain useful and relevant information pertaining to federal employees' duties, and that document is not available in your institution's law library, you may need to conduct discovery in order to obtain it. Courts have granted motions for “jurisdictional discovery” in situations where plaintiffs need additional facts to show that the discretionary function exception does not apply to their claims. *See Martin v. United States*, 2022 WL 2274706, at \*11, Civil Action No. 21-02107-NYW (D. Colo. June 23, 2015) (ordering limited jurisdictional discovery on the question whether there was a valid BOP separation order in place which mandated that the attacker and plaintiff be kept apart).

## If there was no mandatory duty that was violated, can I still argue that the DFE does not apply to my claim?

**Yes.** If there are no “mandatory duties” that were violated in your case, you will need to demonstrate to the court that the conduct you are complaining about does not fall within the protection of the DFE because it does not fulfill the requirements of the second prong of the *Gaubert* test. That prong requires the Government to establish that the challenged conduct is “grounded in the policy of the regulatory regime” - meaning the overall policy goals of the agency. The Government must show that the challenged conduct was “based on the purposes that the . . . regime seeks to accomplish.” *Gaubert*, 499 U.S. at 325 & n.7. There must be a “rational nexus” between the Government's decision and “social, economic, and political concerns.” *Cestonaro v. United States*, 211 F.3d 748, 759 (3d Cir. 2000).

The Supreme Court has stated that if a statute, regulation, or policy gives a government official discretion on how to act, there is a presumption that the official's actions are grounded in policy when exercising that discretion. *See Gaubert* at 324. This presumption, however, is rebuttable, meaning that you can overcome it by providing facts that show that the DFE does not apply. *See Cestonaro*, 211 F.3d at 755 n.4. This can be very difficult to do, but not impossible. For example, in *Sandoval v. United States*, 2019 WL 7188574, at \*5-7, Civ. No. 17-3092 DMG (C.D. Cal. Nov. 15, 2019), after conducting a thorough factual analysis, the court held that the prison's failure to provide readily available protective face masks to inmate orderlies exposed to hazardous dust was not outweighed by policy considerations presented by the Government and therefore, the DFE did not apply.

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<sup>1</sup> 18 U.S.C. § 4042 provides, generally, that the BOP “. . . shall (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States. . . .” Although the language of this statute may seem to set forth “mandatory duties,” courts have regularly held that Section 4042 does not establish a “mandatory duty” under *Gaubert*, because it does not provide specific guidance for the BOP on how to perform these general duties of providing safekeeping, care, subsistence, etc. *See, e.g., Cohen v. United States*, 151 F.3d 1338, 1343 (11<sup>th</sup> Cir. 1998) (The provisions of Section 4042 “do not mandate a specific, non-discretionary course of conduct,” but instead grant BOP “ample room for judgment.”).